No. 84-627

In the Supreme Court of the United States

OCTOBER TERM, 1984

CITY COUNCIL OF THE CITY OF CHICAGO, PETITIONER

v.

MARS KETCHUM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the district court abused its remedial discretion in declining to create certain super-majority black and Hispanic wards as a remedy for a violation of Section 2 of the Voting Rights Act.

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The Solicitor General submits this brief in response to the Court's order inviting a brief expressing the views of the United States regarding this case.

STATEMENT

1. Chicago is divided into fifty wards, each of which elects one alderman to the City Council. See Ill. Rev. Stat. ch. 24, § 21-36 (1941). The 1980 Census reported that the overall population of Chicago was 3,005,072, with 1,299,557 (43%) whites, 1,197,000 (39%) blacks, and 422,063 (14%) Hispanics. Since 1970, the white population had fallen by 700,000, and the black and Hispanic populations had increased by 95,000 and 175,000, respectively (Stip. Facts 10-11). The ward districting plan, which was adopted in 1970, required revisions.

City officials began to draw a reapportionment plan in 1980. The drafters of the plan stated that they tried to draw compact and contiguous districts and tried to keep all incumbents in separate districts. Each incumbent alderman received a proposed districting plan for his

own ward, and revisions in the proposal were made. Under the final plan adopted on November 30, 1981, 28 wards had white majorities of the voting age population, 17 had black majorities, two had Hispanic majorities, and three had no majority of any racial group.

2. In three class actions filed in the United States District Court for the Northern District of Illinois, black and Hispanic plaintiffs alleged that the plan diluted minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, the Fourteenth and Fifteenth Amendments to the Constitution, 42 U.S.C. 1983, 42 U.S.C. 1985, Section 2 of Article 1 of the Illinois Constitution, and Ill. Rev. Stat. ch. 24, § 21-30 (1941). The district court consolidated the three actions. On September 20, 1982, the United States intervened as plaintiff in the consolidated action.

Plaintiffs put on evidence to show that the final plan divided some minority communities, placing significant concentrations of minority residents in majority white wards. One area largely populated by Hispanics—the "north" or "northwest" side—was divided among five wards, leaving only one ward (Ward 31) majority Hispanic in voting age population. Another Hispanic area of the city—the "near southwest side"—was divided among three wards (1, 22, 25), only one of which (Ward 22) had an Hispanic voting age majority. In addition, nearly all of the black residential areas on the south side of Chicago that bordered white residential areas were placed in majority white wards, while no white area on the outside border of a white residential concentration was placed in a majority black ward.

Plaintiffs also put on evidence relating to the history of racial voting patterns in Chicago. The evidence showed significant racial bloc voting, particularly among whites (Tr. 1722). The evidence also showed that, historically, the black and Hispanic populations in Chicago had lower registration rates than the white population and turned out to vote in proportionately fewer numbers. See DX 221; see also Tr. 221-222, 238, 1628, 3713. Prior to 1982,

white registration rates were generally between 78% and 85% of voting age population, while black registration was between 70% and 80%. The white turnout rates were generally near 50% of voting age population; the black rates nearer 35% (DX 221). The Hispanic registration and turnout rates were generally one-third to one-half of the white rates (see also DX 156).[1] However, more recent evidence from the 1982 gubernatorial election and the 1983 mayoral election, and nationwide trends at the time of the 1984 presidential primary, "indicated a marked increase in black registration and turn-out" (Pet. App. 36 n.21). There was also evidence of a history of discrimination against minority group members in the City of Chicago. Witnesses testified about historical discrimination in housing (Tr. 1317), employment (Tr. 1323-1324), and schools (Tr. 3332).

In an oral opinion delivered on December 21, 1982, the district court rejected plaintiffs' argument that the redistricting map was drawn intentionally to dilute minority voting strength (Pet. App. 47-48), but found that the plan violated Section 2 of the Voting Rights Act because it decreased the number of black majority wards from the number that had prevailed in 1980 under the 1970 districting plan (*id.* at 60). The court held that "blacks * * * had acquired a status as a minority group which entitled them to have representation in 19 wards in the City of Chicago" (*ibid.*) and that Hispanics should "be accorded the opportunity to have an elected representative in four wards where they have a majority" and one ward where they constitute a plurality (*id.* at 64).

While agreeing that the City Council's plan was in violation of Section 2, the court rejected the plaintiffs' argu-

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[1] Some witnesses attributed the lower electoral participation of blacks and Hispanics to their lower socio-economic position in Chicago (Tr. 1617-1618, 2593). There was also testimony that minority interest in electoral participation would increase when the minority population in a ward was large enough to make it possible for the minority vote to play a meaningful role in an election.

ments that the various instances of ward boundary manipulation—"fracturing" and "packing"[2]—violated Section 2. "I do not consider that fragmenting of the black or the Hispanic minority is a violation or even very great evidence of a violation of the equitable principles of Section 2. Pretty much the same thing is true with respect to packing" (Pet. App. 58-59). The court commented that "[f]ragmenting * * * is really a step toward integration and packing is a step toward segregation" (*id.* at 59). The court also stated that "the packing is a result of those incumbents who wish to protect their incumbency, protect their turf" (*ibid.*).

The court ordered the defendants to revise six wards (Pet. App. 62-66), and stated that the new minority wards need not have any more than a majority of black or Hispanic voting age population (Pet. App. 63). However, the court noted that because there was a substantial number of Hispanic non-citizens in Wards 22 and 26, it was necessary for the defendants to create districts about 55% Hispanic in voting age population in order to give Hispanics a fair opportunity to elect candidates of their choice in those wards (Pet. App. 65).

When the defendants submitted their redrawn plan on December 23, the court approved Wards 15 and 37, which, as redrawn, gave blacks voting age population majorities of 52.6% and 56.2% respectively (Pet. App. 76-78, 111). The court rejected the defendants' proposal to create only three voting age majority Hispanic wards (Pet. App. 79-83, 111-113). Contrary to its earlier instructions, however, the court decided that despite the presence of non-citizens in some areas, a majority of voting age population would be sufficient to give Hispanics

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[2] "Fracturing" occurs where a cohesive community that would be likely to be included within a single ward under a neutral districting plan is split among two or more wards, thus diluting the voting strength of members of the community. "Packing" occurs when ward boundaries are artificially drawn so as to include an unnaturally high percentage of a disfavored group within a single ward or wards; this "wastes" the votes of the super-majority and diminishes the group's overall influence on the electoral process.

the potential to affect the election in those wards (Pet. App. 120-127). On December 27, the court approved a final plan, creating four wards with Hispanic voting age majorities: Wards 22 (69% Hispanic), 25 (59.5%), 26 (50.09%), and 31 (50.6%).

3. The court of appeals affirmed the district court's finding of a Section 2 violation,[3] but suggested that the scope of the violation may have been broader than that recognized by the district court. While the district court found a Section 2 violation on the basis of "retrogression" and rejected plaintiffs' claims based on the "packing and fracturing of minority communities," the court of appeals expressly concluded that there was a violation "based on retrogression *and* on the manipulation of racial voting populations to achieve retrogression" (Pet. App. 14 (emphasis added)).[4] The court of appeals did not, however, enter substitute findings of fact or conclusions of law on these points, but simply referred approvingly (*id.* at 20-21) to plaintiffs' "allegations." The court also found it "unnecessary to make a formal finding that the 1981 City Council map constitutes intentional racial discrimination" (*id.* at 21) because the need for such a finding was eliminated by amended Section 2; nonetheless, it noted that there was "strong evidence of intentional discrimination here as well" (Pet. App. 16).

The court of appeals then turned to the issue of remedy, stating that the "most significant aspect" of the district court's remedial order was its "determination of what constitutes an effective majority for a minority group within a particular ward" (Pet. App. 24). The court stated (*id.* at 33) that

> [a] guideline of 65% of total population has been adopted and maintained for years by the Department of Justice and by reapportionment experts and

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[3] The United States did not participate in the court of appeals.

[4] The court of appeals criticized, as a matter of law, the district court's rationales for rejecting respondents' claims of packing, fracturing, and boundary manipulation. Pet. App. 18-21; see note 16, *infra*.

> has been specifically approved by the Supreme Court in circumstances comparable to those before us as representing the proportion of minority population reasonably required to ensure minorities a fair opportunity to elect a candidate of their choice.

The 65% figure is derived, the court explained, by augmenting a simple majority with an additional 15% "corrective": 5% to compensate for the minority group's typically lower average age, 5% for its low voter registration, and 5% for its low voter turnout (Pet. App. 33). The court held (*id.* at 29) that the district court's "failure to consider carefully all of the factors which are present here as in comparable situations and which have led other courts to employ such a corrective * * * was an abuse of discretion." While acknowledging that some other "corrective" might be appropriate if supported by reliable statistical evidence (*id.* at 36 & n.21, 41), the court of appeals stated that "when reliable, determinative statistics are not available, * * * the district court should give careful consideration to the 65% figure or some variation of it" (*id.* at 36). The court also held that there should be an additional "appropriate corrective for non-citizenship" in the Hispanic wards (*id.* at 33 n.19).[5]

ARGUMENT

At issue in this case is the remedy for a proven and unchallenged violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973. The principal question is whether it was an abuse of the district court's remedial discretion, under the circumstances of this case, to approve a remedial districting plan creating certain wards in which the minority voters constituted little more than a voting age majority. The court of appeals reversed the district court's order, and required, inter alia, that on remand the district court "seriously consider" adopting a "corrective"—either the "widely accepted 65% guideline" or

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[5] The court of appeals rejected respondents' argument that minority voters are necessarily entitled to restoration of pre-1980 population majorities.

another corrective based on reliable data—to create the "super-majorities" needed "to provide *effective* majorities" for minority voters (Pet. App. 29, 41-42 (emphasis in original)). This decision raises issues of great importance to enforcement of newly-amended Section 2.

Nevertheless, we do not believe that the Court should review this case on the merits in its present posture, for three reasons. First, the issue principally raised by petitioner at this interlocutory stage may be resolved satisfactorily on remand without need for this Court's intervention. Second, the decision of the court of appeals is clearly correct in part, and a remand to the district court is necessary and appropriate to remedy deficiencies in that court's findings. Third, because the district court's analysis of the precise nature of the *violation* was flawed, the question of *remedy* here is hypothetical and premature.[6]

1. Petitioner has offered statistics reflecting that city-wide voter registration and turnout among blacks was comparable to or even exceeded that of whites in recent elections. DX 221, 248. According to these figures, in the 1982 gubernatorial election black voters registered and turned out at rates of 85.9% and 56.1% of the voting age population, respectively, while the comparable figures for white voters were 77.8% and 56.8%. On remand the district court is charged with determining whether these statistics are accurate, reliable, and significant (Pet. App. 32 & n.18). If the district court accepts petitioner's statistics as reliable, there will be no need for this Court to consider the principal question presented as it is now framed. Even assuming that the ordering of "correctives" for low minority voter registration and turnout may under some circumstances be an appropriate remedial measure, it surely could not be justified if minority voter registration and turnout were

[6] We take no position on a fourth potential reason why certiorari should be denied, *i.e.*, the alleged incapacity of petitioner City Council to file this petition through private counsel, in the absence of a City Council resolution. That question is one of state law.

comparable to that of white voters. The interlocutory posture of the case thus argues against certiorari.

2. The court of appeals correctly concluded that the district court failed to take into consideration, when evaluating the political strength of Hispanic voters, the presence within the wards in question of persons who are not yet citizens and are therefore ineligible to vote. Petitioner claims (Pet. 25) that "such a proposition has no legal justification." However, for purposes of analysis of voting strength, non-citizens are equivalent to persons too young to vote, and should be treated in the same fashion. See *City of Rome* v. *United States*, 446 U.S. 156, 186 n.22 (1980) ("[c]urrent voting-age population data" are probative because they "indicate the electoral potential of the minority community"); see also *Wyche* v. *Madison Parish Police Jury*, 635 F.2d 1151, 1161-1162 (5th Cir. 1981). To include persons ineligible to vote on account of non-citizenship in the statistical pool would significantly overstate the degree of Hispanic "electoral potential." See *Burns* v. *Richardson*, 384 U.S. 73, 92-93 (1966).

The district court itself recognized the need to consider the non-citizenship levels in the Hispanic wards (Pet. App. 65); but in approving a remedial map it treated as majority Hispanic two wards with Hispanic voting age population majorities less than 51%. The court of appeals remanded on this issue to permit the district court to conform its remedial order to the standards already enunciated by that court. See Pet. App. 32-33 & n.19. We discern no reason for further review of this question.

3. The remedial question posed in connection with two black wards, Wards 15 and 37, is more difficult and complicated. The district court determined that these wards, which were majority black under the 1970 map but majority white under the City Council's 1981 map, should be restored to majority black status (Pet. App. 62, 71). In approving a remedial redistricting plan proposed by defendants, however, the court determined that voting age population majorities of 52.6% and 56.2%, respec-

tively (total population majorities of 60.1% and 61.7%), were sufficient to constitute these wards as majority black and to remedy any Section 2 violation. The district court stated (Pet. App. 63) that "there is no statistical or objective evidence in the record that a minority is entitled to or should have more than a majority of the voting age population in order to have a reasonably fair opportunity to vote for candidates of their choice or even to elect candidates of their choice." The court stated that evidence presented by "one of the defendants' expert witnesses" satisfied the court "that when the opportunity arises or when the incentive is presented, it is not necessary for a minority to have more than 50 percent to control a ward" (*ibid.*).

The court of appeals reversed, finding that "the court-approved map has not provided an adequate remedy for the Voting Rights Act violation" (Pet. App. 27). The court explained, in setting forth "guidelines" for the remand, that the district court failed adequately to address "the widely accepted understanding * * * that minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice" (*id.* at 29). The court stated that a "guideline of 65% of total population" has been found by the Department of Justice, by this Court, and by reapportionment experts to represent "the proportion of minority population reasonably required to ensure minorities a fair opportunity to elect a candidate of their choice" (*id.* at 33). On remand, the court of appeals required the district court to use either this 65% guideline or "some other uniform corrective" based on registration, turnout, and comparable data (*id.* at 41; see *id.* at 32).

a. Although we conclude that certiorari should be denied, since the Court has sought our views in this case we are bound to add that we have serious reservations, as a matter of law, about the court of appeals' view of the need for creation of super-majority black or Hispanic districts as a remedy under Section 2. The court of ap-

peals has apparently misunderstood the position of the Justice Department and this Court, on which it relied for its 65% "guideline" (Pet. App. 33).

When determining whether to preclear a districting plan under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, the Department's responsibility is to determine whether the proposed plan is intentionally discriminatory or would result in "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer* v. *United States*, 425 U.S. 130, 137 (1976). Contrary to the court of appeals' apparent impression, in making this analysis we attach no particular significance to a 65% figure. The Department has frequently concluded, based on the facts presented in a particular submission, that districts containing a minority population significantly less than 65% (and even 50%) of the total are not retrogressive when compared to the pre-existing plan and are entitled to Section 5 preclearance. Each Section 5 submission must be evaluated in light of the particular factual circumstances —not on the basis of a preordained population percentage.[7] See 1 *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 181, 183-184 (1982) (letter from Asst. Attorney General Reynolds) [hereinafter cited as Senate Hearings]. In any event, it is our view that the legal analysis under the retrogression standard of Section 5 cannot be transplanted to the much different questions arising under Section 2. See pages 18-19, *infra*.

Nor has this Court held that minority voters require a 65% majority in order to have "a reasonable opportunity to elect a representative of their choice" (Pet. App. 29). To the contrary, the Court's recent summary affirmance

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[7] See *Mississippi* v. *United States*, 490 F. Supp. 569, 575 (D. D.C. 1979) (three judge court), aff'd, 444 U.S. 1050 (1980) (in preclearance action under Section 5, district court found super-majority district required where recent discriminatory obstacles to voting, including literacy tests, a poll tax, and a white primary system, "continue[d] to affect black people in many portions of the state," leading to low levels of political participation).

in *Brooks* v. *Allain*, No. 83-1865 (Nov. 13, 1984), indicates that so-called "enhanced majorities" are *not* required as a remedial measure under Section 2. The plaintiffs in *Brooks* urged the three-judge district court to create a congressional district with a black population of at least 64% on the ground that because of low voter registration and turnout among blacks they would be unable to elect candidates of their choice with a lesser percentage. In rejecting the super-majority plans proposed by the *Brooks* plaintiffs, the district court noted: "Amended § 2 * * * does not guarantee or insure desired results, and its goes no further than to afford black citizens an equal opportunity to participate in the political process" (No. GC82-80-WK-O (N.D. Miss. Apr. 16, 1984), slip op. 15). Accordingly, the district court concluded that creation of a district with a 52.8% black voting age population (58% black in total population) would "overcome the effects of past discrimination and racial bloc voting" and would "provide a fair and equal contest to all voters who may participate in congressional elections" (*id.* at 16). In summarily affirming the district court's decision, this Court necessarily rejected the appellants' argument (83-1865 J.S. at 16) that the court's plan was inadequate to remedy the State's violation and to provide members of the minority group an equal opportunity to elect a candidate of their choice.[8]

Similarly, in *Seamon* v. *Upham*, No. P-81-49-CA (E.D. Tex. Jan. 30, 1984), slip op. 11-12, the three-judge district court rejected a Section 2 claim that minority voters

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[8] The appellants in *Brooks* specifically argued in this Court that because of "past discrimination, and continued disparities in income, education and other socio-economic measures," which are reflected in lower black voter registration and turnout, a 52.83% black voting age population majority was not sufficient to remedy the Section 2 violation (83-1865 J.S. at 16). That argument, rejected by this Court in *Brooks*, is remarkably similar to the position adopted by the court below—with the exception that in Chicago, unlike Mississippi, black voters have not been systematically denied their right to vote in the recent past and have greatly increased their registration and voter turnout in recent elections.

were entitled to a " 'safe' district in which the minority population approaches 65% of the overall population"; under the challenged plan, minority voters, while not guaranteed the ability to elect a candidate to office, were found to "exert a significant impact" in two high minority impact districts (slip op. 15). This Court summarily affirmed. *Strake* v. *Seamon*, No. 83-1823 (Oct. 1, 1984). These decisions indicate that Section 2 does not mandate the creation of super-majority districts, even where other objective factors contribute to a finding of a violation of Section 2 under the "totality of the circumstances." [9]

Nor is the court of appeals' holding supported by the legislative history of amended Section 2.[10] The most directly pertinent discussion of the issue in Congress was a colloquy between Representative Levitas and Chairman Edwards, floor manager of the bill, during House consideration of the Senate compromise legislation. Representative Levitas inquired whether the amended Voting Rights Act contained "any numerical percentage of what would constitute a minority district." Chairman Edwards answered that "the bill contains no such provisions." 128 Cong. Rec. H3844 (daily ed. June 23, 1982).

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[9] In *United Jewish Organizations, Inc.* v. *Carey*, 430 U.S. 144, 168 (1977), the Court upheld as constitutional the State legislature's intentional creation of a 65% minority district; but the plurality opinion did not suggest that creation of such a district is required or that it would be an appropriate exercise of a court's remedial discretion.

[10] For a more extended discussion of the elements in the Section 2 compromise, see our amicus curiae brief in support of the jurisdictional statement in *Thornburg* v. *Gingles*, prob. juris. noted, No. 83-1968 (Apr. 29, 1985), at 8-11. We pointed out there, and reiterate here, that the compromise character of Section 2 as it was enacted by Congress makes it necessary to exercise caution in the use of legislative history materials that may reflect the view of only one faction that eventually supported the compromise. For example, the majority views section of the Senate Report, while illuminating on many questions, must be read against other relevant pieces of the legislative history. Isolated statements in the Report do not necessarily reflect the compromise consensus. A copy of our brief in *Gingles* has been provided to the parties in this case.

This case illustrates why a presumptive numerical "corrective" is out of place in Voting Rights Act cases. Plaintiffs presented evidence that voter registration and turnout were historically much lower among blacks and Hispanics than among whites. However, in recent elections there has been "a marked increase in black registration and turn-out," as the court of appeals noted (Pet. App. 36 n.21).[11] Petitioner has presented evidence that minority voter registration and turnout rates now approach or even exceed the rates among white voters (Pet. 3-4). If this evidence is reliable, a decree ordering creation of super-majority wards would plainly not be an appropriate remedy.[12]

More fundamentally, the court of appeals' presumptive requirement of super-majority black and Hispanic wards fails to distinguish between the need to remedy present-day obstacles to political participation by minority group members and an unalloyed desire to protect them from defeat at the polls. The focus of amended Section 2 is not on guaranteeing election results, but rather on securing to every citizen the right to equal "opportunity * * * to participate in the political process" (42 U.S.C. 1973). As Senator Dole, principal sponsor of the compromise Section 2 that passed the Congress, stated in explanation of his proposal, Section 2 would "[a]bsolutely not" provide any redress "if the process is open, if there is equal access, if there are no barriers, direct or indirect, thrown up to keep someone from voting or having their vote counted, or registering, whatever the process may include" (128 Cong. Rec. S6962 (daily ed. June 17, 1982)). Cf. *Whitcomb* v. *Chavis*, 403 U.S. 124, 153 (1971). Supporters of amended Section 2 in the Senate repeatedly emphasized that the provision guaranteed "equal access"

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[11] The district court noted a similar increase in voter registration and turnout among Hispanics (Pet. App. 127-128). See DX 220; Tr. 3712.

[12] A super-majority might also be inappropriate where other voters in the ward are divided among two or more races. See Pet. App. 112, 119-120.

(*e.g.*, 128 Cong. Rec. S6655 (daily ed. June 10, 1982) (Sen. Boren); *id.* at S6961 (daily ed. June 17, 1982) (Sen. Dole)), but that it did not apply where minority voters or candidates "failed to participate given an equal opportunity" (*e.g.*, *id.* at S6779 (daily ed. June 15, 1982) (Sen. Specter)). Accord, *id.* at S6647 (daily ed. June 10, 1982) (Sen. Grassley); *id.* at S6717 (daily ed. June 14, 1982) (Sen. Tower); *id.* at S6717-S6718 (Sen. Moynihan); *id.* at S6964 (daily ed. June 17, 1982) (Sen. Kennedy); *id.* at S7110 (daily ed. June 18, 1982) (Sen. Metzenbaum); *id.* at S7118 (Sen. Sasser).

Accordingly, the question under Section 2 is whether the challenged electoral practice "result[s] in the denial of *equal access* to any phase of the electoral process for minority group members" (S. Rep. 97-417, 97th Cong., 2d Sess. 30 (1982) (emphasis added) [hereinafter cited as Senate Report]). Where minority voters "merely fail[] to participate given an equal opportunity" (128 Cong. Rec. S6779 (daily ed. June 15, 1982) (statement of Sen. Specter)), it would be contrary to the fundamental rationale of amended Section 2 to compensate by creating super-majority seats. As Senator Leahy explained (2 Senate Hearings 46), "[i]t is the opportunity to participate, not the actual use of that right, which is crucial." [13]

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[13] The court of appeals noted (Pet. App. 30) that while "good motivation and organization" would contribute to improved voter participation by blacks and Hispanics in Chicago, this would not "fully rectif[y]" the problem; "[s]ome of the problems, at least, spring from circumstances of low income, low economic status, high unemployment, poor education and high mobility." Cf. Senate Report 29 n.114. Facially neutral registration and voting practices such as restrictive times and locations for registration or residency requirements (the court of appeals' example (Pet. App. 30)) can have a disproportionate impact on persons of low socio-economic status, and thus effectively deny such persons an equal opportunity to participate in the political process. A remedy under Section 2 might well require the jurisdiction to take steps to reduce these obstacles to political participation (for example, by expanding the times or locations for registration). The district court made no specific findings on this issue.

The court of appeals thus erred in its assumption that as a matter of law "minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice" (Pet. App. 29), or that "65% of total population * * * represent[s] the proportion of minority population reasonably required to ensure minorities a fair opportunity to elect a candidate of their choice" (*id.* at 33). The focus of a court's remedial efforts must be not on creating "effective majorities" but on eliminating barriers to equal opportunity to participate in the political process. If the court of appeals were correct—if a 65% majority were "reasonably required to ensure minorities a fair opportunity to elect a candidate of their choice"—then black and Hispanic voters would be entitled to 65% super-majority districts wherever they could be drawn; anything less would deny them the "opportunity" they are entitled to by law. That view (commonly denominated "proportional representation") was expressly repudiated by Congress,[14] and has been rejected by this Court. *Brooks* v. *Allain, supra*; *Strake* v. *Seamon, supra.*

b. That the court of appeals was incorrect in holding that super-majority districts are required as a matter of law does not, however, resolve the question whether the district court's remedial order was an abuse of discretion under the circumstances of this case. We submit that in the current posture of the case, it is difficult to determine whether the court of appeals was correct that the district court's remedy was inadequate.

The remedy for a Section 2 violation, like that for most legal infractions, depends on the violation. See *Upham* v. *Seamon*, 456 U.S. 37, 42 (1982); *General Building Con-*

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[14] The statutory disavowal of proportional representation applies no less to questions of remedy than to findings of violation. Senate Report 31; *id.* at 199 (Supplemental Views of Sen. Grassley); see 2 Senate Hearings 81 (statement of Sen. Dole) ("Fears that the court would consider the disclaimer in determining whether there is a violation but ignore it in fashioning the remedy are unwarranted.").

tractors Ass'n v. *Pennsylvania*, 458 U.S. 375, 399 (1982); *Hills* v. *Gautreaux*, 425 U.S. 284, 293-294 (1976). The Senate Report explicitly endorses in this context "[t]he basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated" (Senate Report 31).[15] To evaluate the remedy we must therefore look first to the violation.

Plaintiffs (supported by the United States) presented extensive evidence that the City Council had systematically fractured black and Hispanic communities and manipulated ward boundary lines in such a way as to dilute minority voting strength. The crux of their case was that the City Council consistently adjusted ward boundaries so that black voters on the edges of predominantly black parts of the city would be split off and placed in white majority wards where they would constitute a large, but ineffectual, minority. White voters, in contrast, were virtually never placed in black wards where their votes would not contribute to a controlling white majority. See Corp. Counsel's Br. in Opp. 2-4. The evidence presented to support plaintiffs' case is summarized in the court of appeals' opinion (Pet. App. 20-21 & n.9). We believe that the district court erred, as a matter of law, in determining that these instances of fracturing, packing, and boundary manipulation did not violate Section 2.[16]

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[15] Senators representing views sometimes at odds with those expressed in the majority views section of the Senate Report, but who supported the compromise adopted by the Congress, approvingly cited this statement concerning remedies under Section 2. Senate Report 104 n.24, para. 4 (Additional Views of Sen. Hatch); *id.* at 199 (Supplemental Views of Sen. Grassley); see also 2 Senate Hearings 81 (statement of Sen. Dole). Accordingly, this statement may be viewed as reflecting a consensus of the Congress. See note 10, *supra*.

[16] Because the question of violation is not before this Court, we will not belabor the weaknesses of the district court's legal analysis in this regard. It suffices to say that the court appeared to misunderstand the significance of manipulative boundary line drawing, dismissing powerful evidence of fracturing as the natural result of

The appropriate remedy for the violation alleged by the plaintiffs would have been, as the Corporation Counsel states, to attempt to replicate as nearly as possible "what the likely ward configuration would have been but for the illegal packing, fracturing and manipulation that actually took place" (Br. in Opp. 20). The remedy is to cure the violation: where cohesive minority communities that would logically fit within a single ward have been illegally fractured, to restore them; where boundaries have been artificially manipulated, to correct them. In other words, if the City Council has used various districting devices (packing, fracturing, boundary manipulation) in a manner that results in dilution of the strength of minority voters, the remedy is to draw a map using appropriate neutral criteria. *Connor* v. *Finch*, 431 U.S. 407, 421-426 (1977); *Marshall* v. *Edwards*, 582 F.2d 927, 937 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979); *Shayer* v. *Kirkpatrick*, 541 F. Supp. 922, 930 (W.D. Mo.) (three-judge court), aff'd, 456 U.S. 966 (1982). The point of amended Section 2 is not to maximize or protect the voting power of any given racial group or to authorize judicial allocation of political power on racial lines; it is to ensure that all citizens have an equal "opportunity * * * to participate in the political

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population shifts (Pet. App. 58) and as "a step toward integration" (*id.* at 59), and stating that the packing was "a result of those incumbents who wish to protect their incumbency" (*ibid.*). We agree with the court of appeals (*id.* at 19) that where incumbent protection takes the form of carving out racially congenial wards for white aldermen, the results may support a finding of a Section 2 violation. Accord, *Major* v. *Treen*, 574 F. Supp. 325, 355 (E.D. La. 1983) (three-judge court). The district court also appeared to misunderstand the statutory concept of the "totality of the circumstances," insisting that a Section 2 violation can be found only on the basis of "the plan as a whole" and not on any "specific areas" or "specific wards" (Pet. App. 71; see *id.* at 54, 56). In our view, the opposite is true. Only by analyzing specific voting practices or procedures can a court determine whether minority voters have been denied equal access to the political system; to focus solely on a districting plan "as a whole" reduces the inquiry to a search for proportional representation.

process and to elect representatives of their choice" without regard to race (42 U.S.C. 1973).[17]

However, the precise contours of a remedy for this violation remain hypothetical and abstract at this point, for the district court's finding of a violation was not based on the plaintiffs' showing of impermissible boundary manipulation. Rather, the court based its finding of a violation, affirmed in part by the court of appeals (Pet. App. 14, 24 n.12), solely on a comparison of the number of wards controlled by minority groups under the challenged plan with the number under the previous plan. We believe that this "retrogression" analysis is not appropriate to Section 2 cases, and that it is improper to predicate a remedy on such a theory of a violation.

"Retrogression" is the standard applied under Section 5, 42 U.S.C. 1973c, to jurisdictions with a history of discrimination touching on voting. See *City of Lockhart* v. *United States*, 460 U.S. 125, 133-136 (1983); *Beer* v. *United States*, *supra*. The legislative history conclusively demonstrates that the standard under amended Section 2 was not intended to be the same as that under Section 5. Senate Report 68; *id.* at 104 n.24, para. 8 (Supplemental Views of Sen. Hatch); 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner with Rep. Edwards concurring); 1 Senate Hearings 1254 (testimony of Julius L. Chambers, President of NAACP Legal Defense Fund); 2 Senate Hearings 80 (statement of Sen. Dole). Indeed, the Senate majority report expressly states that "[p]laintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment * * * involved a retrogressive effect on the political strength of a minority group" (Senate Report 68

[17] In this we agree with the district court (Pet. App. 55) that the proportional representation disclaimer of amended Section 2 "prevent[s] any court from imposing a certain proportion of elected representatives on a city, county, state or any political subdivision and thereby merely by the numbers decide that a certain number of representatives are going to come from each group."

n.224). There must be a showing of a denial of equal access to the political system; a mere numeration of minority and majority controlled districts is not sufficient.

The court of appeals correctly took exception to the district court's legal analysis of the violation, finding specifically that fracturing can dilute minority voting strength in violation of Section 2 and that the manipulation of boundary lines in order to maintain a racially congenial ward for incumbent white aldermen can be discriminatory. Pet. App. 13-14, 18-22. But the court of appeals did not itself define the violation with any degree of precision. (Since respondents' successful argument in the court of appeals for a broader remedy is predicated, in part, on their contention that the district court's finding of a violation was too restrictive, this is one of the matters that must be addressed on remand.) Nor did the court of appeals expressly recognize that an altered theory of violation implies the need for a different theory of remedy. A "retrogression" theory of violation might sug gest that the remedial question is how to allocate political power among racial groups so as to preserve the position of blacks and Hispanics, while the alternative theory of boundary manipulation—espoused by respondents and approved by the court of appeals—would, as discussed above, suggest a remedy based on undoing the violations. On remand, if the district court corrects its holding on violation—as the court of appeals, the respondents, the Corporation Counsel, and we agree it should—then it may also conclude that the question of remedy is not so simple as to create majority (or super-majority) black and Hispanic districts in a pre-ordained number of wards.

In sum, as this case reaches the Court, it is undisputed that the City Council's districting plan violated Section 2, but there is no legally sound analysis of the precise nature of the violation. Since the nature of the violation has not adequately been established, this is not an appropriate case for this Court to address the difficult questions of remedy raised by petitioner. In order to deter-

mine what remedy the minority voters of Chicago are entitled to (and even to determine whether the district court's remedial order was an abuse of discretion), further proceedings on remand are required.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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